RECORD AND BRIEFS 10

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IN THE

Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, BISHOP AUGUSTINE NUMENE JOHN-MILLER, CHARLES BARIDORN WIWA, ISRAEL PYAKENE NWIDOR, KENDRICKS DORLE NWIKPO, ANTHONY B. KOTE-WITAH, VICTOR B. WIFA, DUMLE J. KUNENU, BENSON MAGNUS IKARI, LEGBARA TONY IDIGIMA, PIUS NWINEE, KPOBARI TUSIMA, individually and on behalf of his late father, CLEMENT TUSIMA,

Petitioners,

vs.

ROYAL DUTCH PETROLEUM CO., SHELL TRANSPORT AND TRADING COMPANY PLC, SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA, LTD.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether the issue of corporate civil tort liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, is a merits question, or an issue of subject matter jurisdiction, as the court of appeals held.

2. Whether corporations are excluded from tort liability for violations of the law of nations such as torture, extrajudicial executions or other crimes against humanity, as the Second Circuit held, or instead may be sued in the same manner as any other private actor under the ATS for such egregious violations, as the D.C., Seventh, Ninth and Eleventh Circuits have explicitly held.

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INTRODUCTION

This Court held in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), that the Alien Tort Statute ("ATS"), 28 U.S.C. §1350, by its grant of jurisdiction, authorized the federal courts to recognize federal common law causes of action to redress violations of a small number of well-established customary international norms. The plaintiffs in this case allege such violations, including torture, extrajudicial killings and crimes against humanity, which were committed against them by the military dictatorship in power in Nigeria from 1992 to 1995, aided and abetted by respondents.

A sharply divided Second Circuit panel rejected plaintiffs' claims, holding that ATS jurisdiction does not extend to suits against corporations based on the majority's belief that there is no customary international norm of corporate liability. This decision ignored the structure and substance of international law, the text, history and purpose of the ATS, and disregarded this Court's holding and reasoning in *Sosa*. The imposition of civil liability on corporations has been an established feature of American law and, in fact, of all other major legal systems in the world for centuries.

There is no sound basis for the majority's unprecedented exclusion of corporations from ATS civil tort liability. The decision should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 621 F.3d 111 (2d Cir. 2010). The court of appeals' orders denying plaintiffs' timely petition for rehearing *en banc* and for panel rehearing and the opinions filed with those orders (Pet. App. C and D) were entered February 4, 2011. These orders and related opinions are reported at 642 F.3d 268 (2d Cir. 2011) and 642 F.3d 379 (2d Cir. 2011). The opinion of the district court (Pet. App. B) is reported at 456 F. Supp. 2d 457 (S.D.N.Y. 2006).

JURISDICTION

This Court has jurisdiction based upon 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

STATEMENT OF THE CASE

1. This case was filed in 2002 by twelve Nigerian plaintiffs who alleged, on behalf of themselves and a putative class, that respondents

aided and abetted the human rights violations committed against them by the Abacha dictatorship in the Ogoni region of the Niger Delta in Nigeria between 1992 and 1995.

The plaintiffs, and the violations they suffered, present a microcosm of the widespread and systematic human rights violations perpetrated in the early 1990s against a popular grassroots movement, known as the Movement for the Survival of the Ogoni People, that sought human rights and environmental justice and protested against Shell's operations in Ogoni. J.A. 42-54, 62-74 (First Amended Complaint ("FAC"), ¶¶ 1-4, 6-17, 44-77). The Nigerian military, aided and abetted by respondents and their agents, engaged in a widespread and systematic campaign of torture, extrajudicial executions, prolonged arbitrary detention, and indiscriminate killings constituting crimes against humanity to violently suppress this movement. J.A. 42-44, 58-73 (FAC, ¶¶ 1-4, 32-43, 45-54, 56-57, 59, 61-75).

In September 2006, after most of the discovery in the case had been completed, the district court denied in part and granted in part respondents' motion to dismiss the claims in plaintiffs' First Amended Complaint. Pet. App. B. However, the district court certified for an immediate interlocutory appeal the issue of whether certain of petitioners' substantive claims were actionable under this Court's decision in *Sosa*. *Id.* at B 21-23.

2. On September 17, 2010, a sharply divided Second Circuit panel held that corporations could not be sued for torts committed in violation of the law of nations under the ATS. *Id.* at A 15. The panel did not decide any of the issues certified for appeal by the district court. Characterizing corporate liability under the ATS as an issue of subject matter jurisdiction, the *Kiobel* majority determined that it was required to decide that issue, even though it was never raised, briefed, argued or decided at any point in the nearly decade-long litigation below. *Id.* at A 25.

Judge Cabranes, writing for the majority, found that footnote 20 of this Court's *Sosa* decision required that courts distinguish between private actors who were natural persons and private actors who were juridical entities in determining the universe of permissible ATS defendants, even though no such distinction had previously been recognized. *Id.* at A 28. The *Kiobel* majority also concluded that footnote 20 required that in ATS cases brought against corporate defendants, plaintiffs were required to prove a customary international law norm of corporate criminal liability, even though the majority acknowledged that footnote 20 did not address this issue. *Id.* at A 31.

Conducting a selective review of international sources, the *Kiobel* majority concluded that no customary international norm of corporate liability existed. *Id.* at A 39-72. The majority focused its review of international sources on the omission of

corporations from the jurisdiction of modern international *criminal* tribunals, even though ATS jurisdiction is explicitly limited to civil tort actions. *Id.* at A 43-54, 68-70.

The *Kiobel* majority also placed great emphasis on a purported absence of case law holding corporations accountable directly under international law for violations of international human rights norms (*id.* at A 14, 67), ignoring the fact that international law generally leaves the mechanisms by which international obligations are enforced to each State to determine under its domestic law. Unlike this Court's *Sosa* analysis, the *Kiobel* majority did not examine the text, history, or purpose of the ATS in reaching its unprecedented conclusion.

Judge Leval disagreed with both the majority's methodology and holding. *Id.* at A 81-82. He observed that "[t]he position of international law on whether civil liability should be imposed for violations of its norms is that international law generally takes no position and leaves that question to each nation to resolve . . . the United States, through the ATS has opted to impose civil compensatory liability on violators and draws no distinction in its laws between violators who are natural persons and corporations" and, therefore, an ATS plaintiff should be entitled to recover against a tortfeasor regardless of whether the defendant is a natural person or a corporation. *Id.* at A 87.

Judge Leval also disputed the majority's international law analysis. He viewed the absence of corporate criminal liability in modern international criminal tribunals as irrelevant to the scope of *civil* liability provided for in the ATS. *Id.* at A 85-86, 118-26. He also challenged the majority's assertion that corporations are not "subjects" of international law. *Id.* at 86-87. Judge Leval emphasized that Nuremberg jurisprudence, especially the *I.G. Farben* case, recognized that corporations had obligations under international law and were capable of committing international law violations. *Id.* at A 94, 149-50.[1]

3. Petitioners sought rehearing and rehearing *en banc* on the grounds that (a) they had been denied an opportunity to brief and argue the issue of corporate liability, and (b) the issue was a merits issue that had been waived by respondents. Petitioners also sought *en banc* review on the merits because the majority opinion created a conflict in the circuits.

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[1] Judge Leval concluded that plaintiffs' allegations of respondents' complicity did not meet the pleadings standards articulated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Pet. App. A 176-81. These decisions postdated the motion to dismiss in this case and if this view became the holding of the court of appeals on remand, plaintiffs would seek leave to amend to add factual allegations based on nearly complete discovery.

The Second Circuit declined to hear the case *en banc* by a five-to-five vote.[2] *Id.* at C 2. In dissenting from the denial, four judges explicitly stated that, for the reasons set forth in Judge Leval's opinion, the "panel majority opinion is very likely incorrect." *Id.* at C 3. Judge Katzmann also dissented separately to emphasize that the majority's reliance on his concurrence in *Khulumani v. Barclay Nat'l Bank, Ltd.* 504 F.3d 254, 270 (2d Cir. 2007) (Katzmann, J., concurring), was erroneous and that "corporations, like natural persons, may be liable for violations of the law of nations under the ATCA." Pet. App. C 5.

All three members of the panel continued their debate in separate opinions filed in connection with the denial of the petition for rehearing. Chief Judge Jacobs's opinion made it clear that his decisive vote to exclude corporations from liability under the ATS was based on his general view that ATS cases against corporations should not be allowed on policy grounds. *Id.* at D 5-7, 9. Judge Cabranes insisted the result was compelled by this Court's decision in *Sosa*. *Id.* at D 24-25. Judge Leval responded to Chief Judge Jacobs' policy arguments by underscoring that it was not the role of the courts to circumscribe the reach of the ATS based upon policy concerns. *Id.* at D 13. As Judge Leval emphasized, "[n]either the law of nations nor the Alien Tort Statute furnishes any basis for leaving corporate and other juridical entities free to

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[2] The panel denied the applications of all *amici curiae* to file briefs in support of rehearing *en banc*. Pet. App. E 1-13.

violate fundamental human rights without liability to victims." *Id.* at D 23.

SUMMARY OF ARGUMENT

1. The Second Circuit erred by treating the issue of corporate liability as an issue of subject matter jurisdiction, leading the court to decide an issue not properly before it and never raised by respondents in nearly a decade of litigation. This Court has emphasized the importance of distinguishing issues of subject matter jurisdiction from merits issues. *See, e.g., Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010). The *Kiobel* majority's *sua sponte* holding that the liability of corporations under the ATS is a matter of subject matter jurisdiction has no support in the decisions of any circuit and is inconsistent with this Court's holdings that questions of liability under a statute should not be conflated with issues of subject matter jurisdiction. The ruling below will unnecessarily complicate the administration of ATS cases in the future and should be reversed.

2. The concept that corporations may be civilly liable for the torts committed by their agents is neither new nor exotic. Such liability is a function of loss allocation principles that have been a feature of all legal systems in the world for as long as corporations have existed. It is a cornerstone of the bargain shareholders make in order to secure the benefits of perpetual life, free transferability of

shares and limited liability for their commercial enterprises.

(a) Nothing in the text, history or purpose of the ATS suggests that the drafters meant to exclude entities from the tort liability recognized in the statute. This Court has observed that the ATS "by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

Corporate tort liability was part of the legal inheritance our country received at its founding. Entity liability existed at that time, including civil liability for violations of the law of nations. For example, responsibility for losses caused by maritime torts have always been assessed against the owners of ships, whether they conducted business as natural persons, partnerships or corporations; these proceedings were usually *in rem* against the ships themselves. The First Congress legislated in this historical context when it gave the federal courts authority to enforce the law of nations by means of "tort" remedies.

Civil claims against entities based on violations of the law of nations were brought in state courts at the time that the ATS was adopted. The ATS ensured that aliens with such claims had a federal forum in which to remedy torts committed in violation of the law of nations.

(b) This Court's reasoning in *Sosa*, when applied to the issue of corporate liability, makes clear that there is no basis for excluding corporate defendants from tort liability under the ATS. As the *Sosa* Court held, the ATS granted federal courts jurisdiction and the corresponding authority to recognize federal common law causes of action to remedy law of nations violations. The common law has always recognized the civil liability of juridical persons. Moreover, federal courts have always looked to domestic law to supply the rules governing the litigation of law of nations claims when international law does not supply these rules.

The *Kiobel* majority's view that footnote 20 in *Sosa* requires ATS plaintiffs to identify a customary international norm of corporate liability is wrong. Footnote 20 deals solely with the specific issue of identifying customary norms that require the involvement of state actors and those that do not. There is no support in footnote 20, or any other source, whether domestic or international, that distinctions may be drawn *among* categories of private actors for any purpose under the ATS.

The *Kiobel* majority's exclusion of corporations from the universe of ATS defendants has been rejected by every other Circuit to consider the issue. The D.C., Seventh, Ninth and Eleventh Circuits have all held that corporations may be sued under the ATS.

(c) There is no principle of international law that limits the power of States to enforce customary international law by imposing civil tort liability against corporations over which they have jurisdiction. International law generally leaves to each sovereign State the discretion to enforce its international law obligations as it chooses. The First Congress chose to enforce the law of nations, in part, by means of domestic civil tort actions. Moreover, corporate civil liability for torts committed by corporate agents is a general principle of international law.

The *Kiobel* majority's conclusion that there is no corporate liability under the ATS simply does not follow from its fixation on the fact that international criminal tribunals do not typically have jurisdiction over corporations. The ATS is a domestic civil tort statute that serves different purposes than those served by international criminal tribunals.

Recognizing civil tort liability for corporations does not involve the imposition of idiosyncratic American rules in ATS cases. Under the ATS, plaintiffs must first demonstrate a violation of the law of nations based on specific and substantial evidence. Enforcing such universal norms by applying domestic rules of decision to other issues in ATS cases is the accepted manner of enforcing international norms in every legal system.

There is no principle of international law immunizing corporations from civil liability for

violations of international law. Indeed, international norms require accountability for international law violations whether committed by States, state officials or private actors, such as corporations.

The *Kiobel* majority's opinion is contrary to the basic purposes of the ATS and international law. If corporations are exempt from civil actions under the ATS, the statute cannot be used to redress genocide or crimes against humanity perpetrated by the modern counterparts to I.G. Farben. If Congress wishes to amend or repeal the ATS, it may do so. But nothing in the text, history or purpose of the ATS, this Court's *Sosa* decision or international law remotely supports the broad immunity the *Kiobel* majority bestowed, without provenance, on corporations complicit in the most heinous violations of customary international law.

ARGUMENT

I. WHETHER A CORPORATE DEFENDANT CAN BE SUED UNDER THE ATS IS NOT AN ISSUE OF SUBJECT MATTER JURISDICTION, BUT RATHER A SUBSTANTIVE INQUIRY ADDRESSING THE MERITS OF THE CLAIM.

The ATS's text does not limit ATS jurisdiction to a specific class of defendants. This Court has held that the ATS authorizes the recognition of federal common law causes of action for a limited category of violations of the law of nations. *Sosa*, 542 U.S. at 712.

The ATS may be jurisdictional in its terms, but the *Kiobel* majority's approach would transform nearly every issue in an ATS case into one of subject matter jurisdiction. This would be inconsistent with this Court's decisions, with the language of the statute, and with prudent judicial administration.

The question of whether a defendant's conduct is prohibited by a given statute is a key element of the merits of a plaintiff's claim; it is not a question of subject matter jurisdiction. This Court has recognized the risk of conflating jurisdictional and merits-based questions, and has drawn a sharp line between the two. It has directed a retreat from what it has termed the "profligate" and "less than meticulous" use of the term "jurisdiction" to label components of a federal statute. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11 (2006) (finding whether a defendant fell within Title VII's definition of "employer" is not jurisdictional); *see also Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1247 (2010) (finding 17 U.S.C. § 411(a)'s registration requirement is not jurisdictional). Federal courts have been instructed to "'facilitat[e]' clarity by using the term 'jurisdictional' only when it is apposite." *Id.* at 1244 (citing *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004)).

The *Kiobel* majority's *sua sponte* holding that the issue of corporate liability is an issue of subject matter jurisdiction conflicts with this Court's holdings admonishing lower federal courts against "drive-by jurisdictional rulings" that miss the critical differences between "true jurisdictional conditions and

nonjurisdictional . . . causes of action." *Id.* (citing *Arbaugh*, 546 U.S. at 511); *see also Morrison*, 130 S. Ct. at 2876-77; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 90 (1998).

A. The Applicability of the ATS to a Particular Defendant is a Merits Issue Because it Addresses the Substantive Reach of the Statute.

The issue of whether a corporation can be sued under the ATS is a merits-based question because it addresses the substantive reach of the statute. In *Morrison*, this Court drew a sharp line between subject matter jurisdiction and substantive merits. At issue was the extraterritorial application of §10(b) of the Securities and Exchange Act to misconduct by foreign defendants against foreign plaintiffs in transactions on foreign exchanges. The Court unanimously said that "to ask what conduct [a statute] *reaches* is to ask what conduct [it] *prohibits*, which is a *merits* question. Subject-matter jurisdiction, by contrast, 'refers to a tribunal's power to hear a case . . .' It presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief." *Morrison*, 130 S. Ct. at 2877 (emphasis added) (quoting *Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs. and Trainmen Gen. Comm. of Adjustment, Central Region*, 130 S. Ct. 584, 596 (2009)).

In *Morrison* this Court made clear that the determination of whether a statute controls,

regulates, or prohibits an actor's conduct is a substantive inquiry and not a question of jurisdiction.[3] This is not a new proposition; this Court long has distinguished between subject matter jurisdiction and the question of whether there is a cause of action against a particular defendant.[4] By confusing the question of whether causes of action for violations of the law of nations reach corporations with the issue of subject matter jurisdiction, the *Kiobel* majority made the precise error this Court identified in *Morrison*.

B. Under the ATS the Identity of the Defendant Is Not Jurisdictional.

Because the ATS is silent as to the identity of the defendant, the question of who can be sued under the ATS is not jurisdictional. In *Arbaugh*, this Court established that a "limitation on a statute's scope shall count as jurisdictional" only when "the Legislature clearly states" that the limitation has this character. 546 U.S. at 515. Indeed, "when Congress does not rank a statutory limitation . . . as

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[3] *See* Howard M. Wasserman, *The Demise of "Drive-by Jurisdictional Rulings,"* 105 NW. U. L. REV. COLLOQUY 184, 189 (2011).

[4] *See, e.g., Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 523 n.3 (1991) (even when Congress's intent to allow a cause of action is in question question "[w]hether a cause of action exists [against the postal service] is not a question of jurisdiction"); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 277–79 (1977) (whether defendant is subject to suit under 42 U.S.C. § 1983 is not a question of subject matter jurisdiction).

jurisdictional, courts should treat the restriction as nonjurisdictional." *Id.* at 516. Applying this "bright line" test, this Court concluded that Title VII's employee numerosity requirement is a constraint on "a plaintiff's claim for relief, not a jurisdictional issue," since the fifteen-employee limitation appears in a provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515-16 (*citing Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982)).

The ATS explicitly limits the class of plaintiffs requiring them to be "aliens" as a jurisdictional requirement. By contrast, it does not indicate in any way that the identity or nature of the *defendant* is a jurisdictional requirement. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989).

If Congress had intended to make the identity of the defendant jurisdictional in nature, it would have included some limiting language regarding the defendant in the statute. Indeed, Congress limited the identity of defendants in another section of the First Judiciary Act. *See* § II.A.1, *infra*. Instead, as the *Kiobel* majority acknowledged, the ATS "does not specify who is liable" and leaves open the "question of the nature and scope of liability—who is liable for what." Pet. App. A 18. Furthermore, the inclusion of the term "any civil action" in the statute forecloses any implied limitations or exceptions to subject matter jurisdiction for suits against corporations. Congress has had ample opportunity to amend the

ATS to make the nature of the defendant jurisdictional if it wished to do so.

C. Not Every Issue in an ATS Case is a Matter of Subject Matter Jurisdiction.

The jurisdictional nature of the ATS does not convert every element of an ATS cause of action, or every issue raised in ATS litigation, into an issue of subject matter jurisdiction. In *Steel Co.*, 523 U.S. at 86-89, this Court considered a jurisdictional provision of a statute that included a reference to the substantive component of the statute.[5] It concluded that even where a jurisdictional statute contains some elements of the cause of action, "it is unreasonable to read this as making all the elements of the cause of action . . . jurisdictional, rather than as merely specifying the remedial *powers* of the court, *viz.*, to enforce the violated requirement and to impose civil penalties." *Id.* (emphasis in original). Although this Court in *Sosa* described the ATS as "jurisdictional in nature," 542 U.S. at 713, it explicitly rejected the argument that the ATS "does no more than vest the federal courts with jurisdiction." *Id.* at 712. This

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[5] Section 11046(c) of the Emergency Planning and Community Right-to-Know Act of 1986 reads, "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." 42 U.S.C. §11046(c) (2006). At issue was whether the mention of subsection (a) in the jurisdictional grant of subsection (c) rendered subsection (a) jurisdictional as well.

Court held that the ATS provides the basis for federal courts to recognize federal common law claims to remedy law of nations violations. *Id.* at 712, 714. Setting aside the merits of a challenge to the viability of an action brought under the ATS against a corporate defendant, the *Kiobel* majority erred in deeming such a challenge a jurisdictional question.

II. THERE IS NO BASIS FOR THE CATEGORICAL EXCLUSION OF CORPORATIONS FROM THE UNIVERSE OF ATS DEFENDANTS.

A. The Text, History and Purpose of the ATS Demonstrate that Corporations Are Permissible ATS Defendants.

This Court grounded its *Sosa* decision upon an in-depth analysis of the text, history, and purpose of the ATS. *Sosa*, 542 U.S. at 714-20. By contrast, the *Kiobel* majority did not examine any of these sources, instead purporting to search for a customary international norm of corporate liability. Because it abandoned the methodology required by *Sosa*, and by doing so asked the wrong question (*i.e.*, whether there was a customary international norm requiring corporate criminal liability), the *Kiobel* majority's analysis led it ineluctably to the wrong conclusion.

The *text* of the ATS places no limit on the universe of defendants. *Amerada Hess*, 488 U.S. at 438. The tort liability of juridical persons was part of the common law landscape in 1789. *See Doe v. Exxon*

Mobil Corp., 654 F.3d 11, 43-48 (D.C. Cir. 2011). If Congress had intended to exclude entity tort liability from the ambit of the ATS, it would have done so.

The *history* of the ATS indicates that it was enacted to provide an impartial federal forum to adjudicate civil tort actions brought by aliens who had suffered damages attributable to violations of the law of nations. *Sosa*, 542 U.S. at 719-20, 724.

The *purpose* was to ensure that aliens had a federal forum in which to pursue such international law claims free from the parochial prejudices perceived in the state courts of the revolutionary era. *See Sosa*, 542 U.S. at 722 (noting that state common law recognized remedies for international law violations). Excluding corporations from the universe of permissible ATS defendants would have the perverse effect of sending alien tort plaintiffs to state courts, precisely the opposite of the drafters' intent, without any basis in the ambient law of the time for such an exclusion.

1. The Text of the ATS Contains No Limits on the Categories of Defendants.

The text of the ATS excludes no category of tortfeasor from liability for violations of the law of nations, underscoring that the First Congress

intended no differentiation between natural and juridical persons among ATS defendants.[6]

The ATS explicitly limits the category of *plaintiffs* to "aliens," but imposes no comparable limitation on the universe of *defendants*. Any natural person or juridical entity responsible for a tort committed in violation of the law of nations is within the scope of tort liability authorized by the ATS.[7] By contrast, in other sections of the First Judiciary Act, Congress did restrict the universe of defendants. *See, e.g.*, Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77 (limiting defendants to "consuls or vice-consuls").[8]

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[6] *See Conn. Nat'l. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("[A] court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says . . . .").

[7] The *Kiobel* majority saw no inconsistency in allowing domestic law to provide that corporations can be plaintiffs in ATS cases, despite the absence of any customary norm providing for that, while imposing a requirement that ATS *plaintiffs* prove that customary international law provide for tort liability *against* corporations or other juridical entities. Pet. App. A 65 n.44. Attorney General Bradford recognized that corporations were proper ATS plaintiffs in his 1795 Breach of Neutrality Opinion. 1 Op. Atty. Gen. 57 (1795). *See Sosa*, 542 U.S. at 721.

[8] *See Russello v. United States*, 464 U.S. 16, 23 (1983) (negative implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted).

Congress expressly provided *only* for civil *tort* actions in the ATS. *See Sosa*, 542 U.S. at 720. The lawyers of the era, including Oliver Ellsworth, the draftsman of the ATS, fully understood that "tort" referred to a variety of civil wrongs that were actionable against all tortfeasors without the need for further statutory authorization.[9] *Id.* at 719.

The liability of corporations and other juridical entities for the torts of their agents or employees was well-established by the time of the First Judiciary Act.[10] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *469 (1765). As the D.C. Circuit concluded in *Exxon*, 654 F.3d at 47-48, "by 1789 corporate liability in tort was an accepted principle of tort law in the United States."[11]

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[9] *See, e.g.*, Robert J. Kaczorowski, *The Common-Law Background of Nineteenth-Century Tort Law*, 51 Ohio St. L.J. 1127, 1199 (1990); John Henry Wigmore, *Responsibility for Tortious Acts: Its History, in 3 Association of American Law Schools, Select Essays in Anglo-American Legal History*, at 474-573 (1909).

[10] *See, e.g., Mayor of Lynn v. Turner*, (1774) 98 Eng.Rep. 980 (K.B.) (Lord Mansfield) (corporation subject to tort suit for injury it caused); *Chestnut Hill & Springhouse Turnpike Co. v. Rutter*, 4 Serg. & Rawle 6 (Pa. 1818) (discussing history of corporate liability and concluding that "authorities put it beyond doubt" that a corporation could be held liable for a tort).

[11] The *Kiobel* majority also departed from the text of the ATS by limiting its analysis to the scope of jurisdiction of international criminal tribunals. Congress expressly provided *only* for civil "*tort*" actions in the ATS. Thus, the *Kiobel* majority's reliance on the limitations of modern international

Interpreting the text shortly after its enactment in the context of a claim that U.S. citizens had aided and abetted a French attack on the British colony in Sierra Leone, the 1795 opinion of Attorney General Bradford, cited in *Sosa*, 542 U.S. at 721, acknowledges that a corporation was an appropriate plaintiff under the ATS without any suggestion that juridical persons would not be appropriate parties in an ATS case or that the plaintiff corporation would have to prove its capacity to sue under international law. 1 Op. Atty. Gen. 57 (1795). If, for example, the raid on Sierra Leone had been aided or abetted by a corporation, American or foreign, Bradford's analysis makes clear that Congress would not have intended to exclude the corporation from liability under the ATS.[12]

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criminal tribunals is in conflict with the fact that the ATS is a civil tort statute enacted to provide civil remedies to tort victims. Pet. App. A 9-14. *See also* § II.E., *infra*. Of course, there were no international tribunals in 1789 so the drafters of the ATS had no such institutions in mind.

[12] Moreover, in 1907 the Attorney General found that the ATS allowed Mexican nationals to bring a tort claim against a United States corporation. 26 Op. Atty. Gen. 250 (1907). The *Kiobel* majority dismisses the relevance of these opinions (Pet. App. A 64 n.44), but this Court has already emphasized the relevance of the Bradford opinion in interpreting the text of the ATS. *Sosa*, 542 U.S. at 721.

2. The History and Purpose of the ATS Require the Inclusion of Corporations in the Universe of Potential ATS Defendants.

The *Sosa* Court engaged in an extensive analysis of the historical context and purpose of the ATS to determine its meaning and scope. *Sosa*, 542 U.S. at 714-20. The historical sources cited in *Sosa* indicate that juridical persons are included in the universe of permissible ATS defendants.

The ATS tort remedy was one of the First Congress's specific responses to the inability of the Continental Congress to redress violations of the law of nations. *Sosa*, 542 U.S. at 716; *see also* William R. Casto, *The Federal Courts' Protective Jurisdiction on Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 490 (1985-1986).

Congress authorized aliens to bring federal common law tort actions in federal courts for violation of the law of nations to avoid the diplomatic problems that may have resulted from adjudication of these civil claims in more partial state courts.[13] Vattel, the leading 18th-century publicist on the law of nations, underscored that providing a private remedy for foreigners injured by violations of international or domestic law was an essential means of reducing

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[13] *See, e.g.*, Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am.J.Int'l L. 461, 481-82 (1989).

friction between nations. 2 Emmerich de Vattel, THE LAW OF NATIONS §71 (Chitty, ed. 1852).[14]

The ATS provided, by its terms, remedies against any tortfeasor for violations of the law of nations.[15] Given this remedial purpose, there is no rational justification for the exclusion of corporations, or any other category of tortfeasor, from the scope of ATS liability. In particular, such an exemption is irrational since no exclusion would have applied if the same tort claims were brought in state courts. The *Kiobel* majority's exclusion is in direct conflict with the First Congress's intent to open federal courts to aliens seeking remedies for violations of the law of nations. Its effect would be to close the federal courts to claims implicating international law that would simply be litigated in state courts instead. *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95 (Pa. 1784).

To effectuate the drafters' desired remedial purpose, the *Sosa* Court held that the tort cause of action recognized under the ATS derives from federal

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[14] *See* Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 Nw. U. L. Rev. 1027, 1061-67 (2002) (discussing Vattel's important influence on Supreme Court jurisprudence).

[15] By 1789 the doctrine of transitory torts was well-established. *Mostyn v. Fabrigas*, (1774) 98 Eng. Rep. 1021 (K.B.) (Lord Mansfield). Thus, tort claims arising anywhere in the world could be brought against the tortfeasor, natural or juridical, wherever the responsible party was found.

common law, not international law. *Sosa*, 542 U.S. at 720-21. The drafters of the ATS understood that the rules of decision in ATS cases would be found in the common law. *Id.* at 714, 720-21, 724. The ATS requires a violation of the law of nations to trigger subject matter jurisdiction,[16] but federal common law supplies the rules governing the scope of tort remedies in ATS litigation. *Id.* This is precisely the manner in which common law judges handled law of nations cases when the ATS was enacted.[17]

In 1789, as now, the law of nations did not provide universal principles governing the domestic litigation of law of nations claims. Where the law of nations did not provide answers, the courts turned to domestic law. *See, e.g., Talbot v. Jansen*, 3 U.S. (3 Dall.) 133, 159 (1795) (Iredell, J.) (rights of French

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[16] By requiring a violation of the law of nations, it is clear that the ATS is designed to enforce universal norms governing conduct and not idiosyncratic American norms. *See, e.g.*, William Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35 (2010) *available at* http://www.harvardilj.org/2010/05/online_51_dodge/. However, the methods by which each legal system enforces these universal substantive norms will vary with each legal system.

[17] *See generally* Brief for Professors of Federal Jurisdiction and Legal History as *Amici Curiae* Supporting Respondents, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 03-339, 03-485), *reprinted in* 28 Hastings Int'l & Comp. L. Rev. 99, 108-09 (2004); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 Hastings Int'l & Comp. L. Rev. 221, 234 (1996).

privateer determined by law of nations; domestic law governs whether captain is a privateer); *Booth v. L'Esperanza*, 3 F. Cas. 885 (D.S.C. 1798) (No. 1647) (applying domestic agency principles in a law of nations case). In 1789, as now, domestic law would have governed the tort principles applied in ATS cases once a violation of the law of nations was found.

Tort liability for juridical entities in the United States and England was known to the drafters of the ATS in 1789 and was routinely applied to corporations as corporations proliferated.[18] Juridical entities, like corporations, have historically been subject to civil liability for the acts of their agents.

Corporate liability has not been understood as a conduct-regulating norm, but as a means of allocating losses to principals for their agents' torts. *See* William Lloyd Prosser & W. Page Keeton, PROSSER & KEETON ON TORTS, § 69 (5th ed. 1984)

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[18] *See The Case of the Jurisdiction of the House of Peers Between Thomas Skinner, Merchant, and the East-India Company* (1666), 6 State Trials 710, 711 (H.L.) (awarding tort damages against the company for assault and other injuries); *see also* 1 BLACKSTONE, *supra*, *463 (among the capacities of a corporation is "[t]o sue and be sued"); *Cook County, Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 125-26 (2003) (citing sources dating to 1793 confirming the "common understanding . . . that corporations were 'persons' in the general enjoyment of the capacity to sue and be sued."). For a summary of the myriad cases involving private actors and entities in litigation involving the law of nations, see Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 Va. J. Int'l L. 977, 987 n.38 (2011).

("The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon the enterprise itself, as a required cost of doing business."). This was true for violations of the law of nations as much as any other aspect of tort law. *See The Mary Ford*, 3 U.S. (3 Dall.) 188, 190 (1796) (opinion of Lowel, J.) ("[T]he law of nations has been settled . . . in favour of the unfortunate proprietors; and the persons who have found and saved the property, have been compensated . . . in such pecuniary satisfaction, as the laws of particular States have specially provided."). There is no evidence that civil causes of action authorized by the grant of ATS jurisdiction were intended to depart from this established understanding of common law tort loss allocation, including entity liability.

Corporate civil liability, reflecting the evolution of ancient loss allocation principles in privately enforceable international law, is now a bedrock principle of every modern legal system.[19] *See* § II.D. *infra*. Any exclusion of corporations under the ATS would be inconsistent with the text, history and purpose of the statute.

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[19] *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490, 514 (2008) (punitive damages against corporations available for maritime torts).

3. Entity Liability Was and Is a Long-Standing Feature of Maritime Tort Law, Including Piracy, One of the Primary Examples of Law of Nations Violations Identified in *Sosa*.

This Court in *Sosa* identified piracy, a maritime tort, as one of the paradigmatic law of nations violations actionable under the ATS. *Sosa*, 542 U.S. at 720. The First Congress would have been well acquainted with the civil loss allocation principles that had been applied in maritime tort cases, including piracy cases, long before 1789. *See The Rebecca*, 20 F. Cas. 373, 378-79 (D. Me. 1831).[20]

This Court identified three branches of the law of nations at the time of the First Judiciary Act. The first two categories described were "state to state" public international law, and its corollary in the civil commercial context, "privately enforceable" international law, including the law merchant and the

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[20] In *The Rebecca*, Judge Ware found that merchants in the Middle Ages formed limited liability partnerships to engage in risky overseas trading ventures. The partners' liability for damages caused by the captain and crew, as agents of the partnership, was limited to the value of the ship and its cargo. *Id.* at 378-79. *See also, The Case of Thomas Skinner, Merchant v. The East India Company* (1666) 6 State Trials 710 (H.L.); *Delovio v. Boit*, 7 F. Cas 418 (C.C.D. Mass. 1815) (No. 3776).

law of maritime torts. *Sosa*, 542 U.S. at 714-15.[21] This Court found that the drafters of the ATS likely had in mind a third category of the law of nations "in which these rules binding individuals for the benefit of other individuals overlapped with the norms of State relationships." *Id.* at 715. The overlap has significant consequences here. Just as losses for violations of the law of nations were allocated against juridical entities, such as ships, so too can they be allocated against tortfeasor corporations for violations of the law of nations in civil tort actions under the ATS.

The Constitution, by extending the judicial power of the United States to admiralty and maritime cases, empowered this Court to continue the development of maritime law "in the manner of a common law court."[22] *Atlantic Sounding Co. v.*

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[21] *See, e.g., The Scotia*, 81 U.S. (14 Wall.) 170, 187-88 (1872) (maritime law, "[l]ike all the laws of nations . . . [has legal] force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct"); David J. Bederman, *Customary International Law in the Supreme Court, 1861-1900*, at 98 in *International Law in the U.S. Supreme Court: Continuity and Change* (David L. Sloss, Michael D. Ramsey & William S. Dodge, eds., 2011) ("general maritime law was simply the *lex maritima* version of the law of nations . . . ").

[22] As the law of nations developed in the nineteenth century to include new norms, such as the prohibition of slave trading, the maritime liability rules from the piracy context were extended to these new norms. *See, e.g., The Slavers (Kate)*, 69 U.S. (2 Wall.) 350 (1864); *see also* Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (2011).

Townsend, 129 S. Ct. 2561, 2575 (2009) (*citing Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008)); *R.M.S. Titanic, Inc. v. Haver*, 171 F. 3d 943, 961 (4th Cir. 1999) (maritime law has been a part of the law of nations for more than 3,000 years). Maritime law is thus a fixture of federal common law jurisdiction. As Chief Justice Marshall explained in *American Insurance Company v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828), admiralty suits were "as old as navigation itself; and the law of admiralty and maritimes, as it existed for ages is applied by our Courts to the cases as they arise."

The history of entity liability in maritime law dates back to the formation of partnerships, which were recognized in ancient maritime law.[23] Maritime tort liability imposed the costs resulting from the tortious acts of the agents on the owners of ships, regardless of whether the owners were entities or

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[23] The Byzantine Rhodian Sea Laws, codified as early as the sixth and eighth centuries, reference maritime partnerships. Walter Ashburner, The Rhodian Sea-Law: Edited from the Manuscripts, ccxxxiv (1909). Records of the division of ownership shares of ships as profit and risk-allocating mechanisms through the *commenda* date back to the tenth century. Robert S. Lopez & Irving W. Raymond, Medieval Trade in the Mediterranean World 174 (1967). "By the 14th century, the Italian maritime partnership (*societas navalis*) involved a ship as capital, divided into shares (*carati*). A shareholder's liability was limited to his own interest in the ship. His shares were tradable, though often the permission of other shareholders was required." Timur Kuran, *The Absence of the Corporation in Islamic Law: Origins and Persistence*, 53 Am. J. Comp. L. 785, 805 (2005).

natural persons. There is a direct line from the maritime partnerships of the Middle Ages to modern-day entity liability under these principles. *The Rebecca*, 20 F. Cas. at 378-79. The economic historian Sir Michael Moissey Postan found these early partnerships very similar to modern joint stock companies, calling any distinction between the two "somewhat fictitious." M.M. Postan, *Medieval Trade and Finance* 89 (1973).

Thus, the Founders would have been familiar with the central role that entity liability played in maritime law, along with agency and loss allocation principles. There is no evidence of any intent to exclude these fundamental principles of liability in ATS actions. The common law would have filled necessary gaps in ATS cases using established principles such as agency and loss allocation that were evident in other cases construing the law of nations, such as maritime law. The plain language in the ATS authorizing "all causes" in tort supports the conclusion that the authors of the ATS knew that law of nations jurisprudence included entity liability and intended ATS causes of action to reach such entities, including corporations, that violated the law of nations. The *Kiobel* majority's flawed analysis ignored centuries of maritime tort jurisprudence, including paradigmatic piracy cases, which apply long established loss allocation principles to hold entities liable in civil tort for violations of the law of nations.

Maritime entity liability continued unabated after the ATS was enacted. This Court routinely

enforced the underlying loss allocation principles as part of federal common law and decided dozens of *in rem* cases imposing civil liability on ships for violations of international maritime law.[24] In *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844), Justice Story noted that in cases brought for violations of the law of nations, it was not uncommon "to treat the vessel in which or by which, or by the master and crew thereof, a wrong has been done as offender." *See also The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1825); *Bolchos v. Darrell*, 3 F. Cas. at 810. *In rem* actions against ships were the vehicle by which the ship's owners, natural persons as well as partnerships or corporations, bore the losses caused by the acts of their agents pursuing the owners' ventures.

Justice Story, in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558-59, 562 (1818), held that in a maritime libel action by the owner, master, and crew of a neutral vessel that had been seized by a privateer in violation of the law of nations, the Amiable Nancy's owners were liable for the wanton, reckless, and unauthorized acts of their agents to the extent of the value of the vessel and its cargo. Here, Justice Story

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[24] *See, e.g., The Belgenland*, 114 U.S. 355 (1885); *The Scotia*, 81 U.S. (14 Wall.) 170 (1869); *The Malek Adhel*, 43 U.S. (2 How.) 210 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826); *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822); *Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 240 (1804); *The Mary Ford*, 3 U.S. (3 Dall.)188 (1796); *see also* Bederman, *supra* note 23, at 92-100; David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* Sloss, Ramsey & Dodge, *supra* note 21, at 7, 23-31.

used traditional common law *in rem* and maritime agency principles to allocate economic loss to the ship owners because their commercial venture, in violating the law of nations, was responsible for damages. These same liability principles were applied to corporations as they emerged as the dominant limited liability commercial entity later in the nineteenth century. These cases demonstrate that, throughout the nineteenth century, this Court routinely imposed civil liability on entities other than natural persons for violations of the law of nations.

Recently, Judge Posner, in finding that corporations were proper ATS defendants, emphasized in *Flomo v. Firestone National Rubber Co.* 643 F. 3d 1013, 1021 (7th Cir. 2011), that the loss allocation rules of federal maritime tort law apply in the same way to corporations in ATS actions as they do to civil piracy actions against ships *in rem*:[25]

> And if precedent for imposing liability for a violation of customary international law by an entity that does not breathe is wanted, we point to *in rem* judgments against pirate ships. *E.g., The Malek*

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[25] Judge Posner's view follows the general rule set forth in Benedict on Admiralty, § 106, 7-14 (7th ed.) (citing *Tucker v. Alexandroff*, 183 U.S. 424 (1901) (the vessel is treated as though having a juridical personality, an almost corporate capacity, possessing not only rights but liabilities (sometimes distinct from those of the owner)). *See also The Sabine*, 101 U.S. 384 (1879) and *The Maggie Hammond*, 76 U.S. (9 Wall) 435 (1869).

> *Adhel*, 43 U.S. (2 How.) 210, 233-34, 11 L.Ed. 239 (1844); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40-41, 6 L.Ed. 405 (1825). Of course the burden of confiscation of a pirate ship falls ultimately on the ship's owners, but similarly the burden of a fine imposed on a corporation falls ultimately on the shareholders.

Flomo, 643 F.3d at 1021.

Since merchant ships were the *sine qua non* of international trade in revolutionary America, the drafters of the ATS were intimately familiar with entity liability for torts committed in violation of the law of nations. There is no evidence whatsoever that they sought to carve out an exception from the general rule of entity liability for torts in violation of the law of nations in any context. Given this history, if the drafters intended to exclude entity liability, they would have said so.

B. The *Sosa* Decision Does Not Support the Exclusion of Corporate Defendants from Tort Liability Under the ATS.

1. The Cause of Action in ATS Cases Is Derived from Federal Common Law.

Under *Sosa*, an ATS plaintiff must allege and prove violations of the law of nations with definite content and acceptance among civilized nations equivalent to "the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. [26] The *Sosa* Court found that federal common law, not international law itself, provided the cause of action in ATS cases. *Id.* at 714, 720-21, 724.

The *Kiobel* majority's approach conflicts with this Court's holding that federal common law provides the cause of action in ATS actions. *Sosa*, 542 U.S. at 730-31. It turns a blind eye to federal common law and the universal availability of corporate civil liability in all legal systems, and it relies on the absence of an international law requirement for such liability even though international law leaves such issues to domestic legal systems.

Any analysis requiring universality of essential procedural or remedial rules in ATS cases will render

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[26] These paradigms included attacks on Ambassadors, violations of the safe conduct, and piracy. *Sosa*, 542 U.S. at 715 (citing 4 BLACKSTONE, *supra*, *68).

the ATS a dead letter, and would amount to a judicial repeal of the statute. The *Sosa* Court rejected the argument that the ATS was stillborn until Congress passed implementing legislation. *Sosa*, 542 at 714.

The debate below between the *Kiobel* majority and Judge Leval mirrors a debate about the relationship between international law and the ATS dating back to the opinions of Judges Bork and Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), that the *Sosa* Court resolved. This Court adopted Judge Edwards's view that the structure of the international legal system is based on the principle that each State is responsible for implementing its international law obligations in accordance with its own domestic law and institutions. *Id.* at 778 (Edwards, J., concurring); *Sosa*, 542 U.S. at 714, 729-30.

It is a fundamental principle of international law that domestic law supplies the remedial structure for the domestic enforcement of international law obligations by States. *See* 1 Sir. Robert Jennings & Sir Arthur Watts, *Oppenheim's International Law* § 21 (9th ed. 1992).[27] Thus, in implementing this

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[27] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964); *Flomo*, 643 F.3d at 1020 ("International law imposes substantive obligations and the individual nations decide how to enforce them."); *see also*, Antonio Cassese, *International Law*, 166, 168 (2001); Eileen Denza, *The Relationship Between International and National Law*, *in International Law* 411 (Malcolm D. Evans et al, 3d ed. 2010); *see also, Breard v. Greene*, 523 U.S. 371, 375 (1998) ("[I]t has

nation's obligations to enforce the law of nations, Congress had the discretion to impose tort liability on any person, natural or juridical, responsible for violating the law of nations, or to exempt juridical entities from this form of liability if it so chose. It created no such exception to ATS liability for corporations.

The First Congress chose common law tort remedies to enforce the law of nations, *Sosa*, 542 U.S. at 724, 731, out of necessity because the law of nations, then and now, did not and does not prescribe a comprehensive system of remedies for addressing violations of the law of nations. *See* § II.A.2, *supra*. The common law allowed for the enforcement of the law of nations in domestic courts, the only courts available for such enforcement until the 20th century.

Judge Bork would have required ATS plaintiffs to identify a cause of action for *civil* tort damages in international law before an ATS claim could proceed. *Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring). Because international law does not generally prescribe domestic tort law remedies, Judge Bork's view would have led to a "stillborn" ATS. This Court explicitly considered and rejected that view in *Sosa*, 542 U.S. at 714, 729-30.

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been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum state govern the implementation of the [nation's international obligations] in that state.").

2. This Court Did Not Hold in Footnote 20 of *Sosa* That Customary International Law Must Define the Categories of Private Actors Subject to Suit Under the ATS.

Ignoring the federal common law foundation for ATS causes of action, the *Kiobel* majority held that this Court mandated that customary international law must identify the particular category of private actor subject to suit under the ATS. Pet. App. A 32-36. The sole basis offered for this holding was footnote 20 in *Sosa*.[28] But as the *Kiobel* majority conceded (Pet. App. A 33, 34 n.31), that footnote addressed a completely different issue, the substance of a conduct regulating international norm – *i.e.*, the norm that, if violated, can confer jurisdiction to recognize a federal common law cause of action.[29]

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[28] The full text of footnote 20 states: A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. *Compare Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J. concurring) (insufficient consensus in 1984 that torture by private actors violates international law), *with Kadic v. Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995) (sufficient consensus in 1995 that genocide by private actors violates international law). *Sosa*, 542 U.S. at 732 n.20.

[29] The only other explicit reference to corporations in *Sosa* is in footnote 21 in which the Court discusses doctrines of case-specific deference in the context of cases challenging

Indeed, as Judge Leval observed, "[f]ar from implying that natural persons and corporations are treated *differently* for purposes of civil liability under ATS, the intended inference of the footnote is that they are to be treated *identically*." Pet. App A 117. (emphasis in original). Some abuses, such as torture, violate international law only when committed with state action;[30] whereas others, such as genocide, violate international law when committed by private actors, such as corporations, regardless of state action. The actions of Nazi corporations during the Third Reich made clear that private corporations are as capable as natural persons of committing or abetting genocide and other human rights violations, and thus violating international law. *See* § II.E, *infra*.[31]

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corporate complicity in apartheid in South Africa. 542 U.S. at 733 n.21. There is no suggestion in footnote 21 that corporations might not be within the universe of ATS defendants; this Court was instead suggesting other possible limitations on ATS actions against corporations (*e.g.*, the political question doctrine).

[30] Of course, a private corporation can commit torture if a state actor instigates, or acquiesces in, the violation. Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, Art. 1.

[31] Though the issue is not presented and need not be resolved in this case, the *Kiobel* majority asserted, without reasoning or authority, that the ATS could recognize neither the issue of aiding and abetting liability nor corporate defendants unless each was found to be a universal customary international norm. However, the issues are analytically distinct: whether particular behavior (*e.g.*, aiding and abetting a violation of international law) is sufficient to state a federal common law

C. Established ATS Jurisprudence Overwhelmingly Rejects the Exclusion of Corporations from the Universe of ATS Defendants.

Kiobel is the only appellate decision finding that corporations are excluded from the universe of ATS defendants. Prior to *Kiobel*, corporations, and other juridical defendants (*e.g.*, the PLO in *Tel-Oren*) were sued under the ATS without controversy.[32]

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claim under the ATS is not necessarily governed by the same source of law as the question whether particular categories of private (or public) actors may be sued in tort under the statute. The circuits are divided on the source of the rule of decision for aiding and abetting liability under the ATS. *Compare Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009) (international law applies) *with Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1157 (11th Cir. 2005) (federal common law applies.) But even judges who have found that complicity liability is governed by international law have recognized that such conduct can be engaged in by natural or juridical persons alike. *Exxon*, 654 F.3d at 41-43, 50-51; Pet. App. A 164-69 (Leval, J., concurring).

[32] *See, e.g., Mujica v. Occidental Petroleum Corp.*, 564 F.3d 1190 (9th Cir. 2009); *Sinaltrainal v. Coca-Cola*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 (9th Cir. 2008); *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1253 (11th Cir 2005); *See also, e.g., Herero People's Reparations Corp. v. Deutsche Bank, AG*, 370 F.3d 1192, 1195 (D.C. Cir. 2004); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *vacated on other grounds*, 403 F.3d 708 (9th Cir. 2005); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir.

Although the Eleventh Circuit was the only appellate court to hold explicitly that corporations could be sued prior to *Kiobel*,[33] ATS suits against corporations have proceeded without courts expressing any doubt that corporations were proper defendants under the ATS.[34]

In *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008), the Eleventh Circuit reaffirmed its decision in *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F. 3d 1242, 1253 (11th Cir. 2005), that "[t]he text of the [ATS] provides no express exception for corporations . . . and the law of this circuit is that this statute grants jurisdiction from

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1988); *Tel-Oren v. Libran Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Prior to *Kiobel* one district court in the country reached the same conclusion. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1143 (C.D. Cal. 2010). This decision has been overruled by the *Sarei* decision. *Sarei v Rio Tinto, PLC*, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).

[33] *See Sinaltrainal*, 578 F.3d at 1263; *Romero v. Drummond Co.* 552 F.3d 1303, 1315 (11th Cir. 2005); *Aldana.*, 416 F.3d at 1253.

[34] *Khulumani v. Barclay Nat'l. Bank, Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998). Indeed, in *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 174 (2d Cir. 2009), the Second Circuit stated that it understood *Khulumani* to hold "that the ATS conferred jurisdiction over multinational corporations" that abetted apartheid in South Africa.

complaints of torture against corporate defendants." 552 F.3d at 1315 (citation omitted).

After *Kiobel* was decided, three additional circuits have ruled on this issue under the ATS and all three have rejected *Kiobel*'s holding and reasoning. In *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 39-57 (D.C. Cir. 2011), the D.C. Circuit held that domestic law governs the issue of corporate liability and that the "law of the United States has been uniform since its founding that corporations can be held liable for the torts committed by their agents." *Id.* at 57. The *Exxon* majority also noted that as corporate tort liability was confirmed by international practice in treaties and the legal systems of the world, "it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for 'shockingly egregious violations' of universally recognized principles of international law." *Id.*

The Seventh Circuit has also held that corporations may be sued under the ATS. *Flomo*, 643 F.3d at 1017-21. Writing for a unanimous Court, Judge Posner dismissed the *Kiobel* majority's decision as an "outlier," *id.* at 1017, rejecting its reasoning and holding. Judge Posner emphasized that the ATS is a civil tort liability statute and that corporate civil tort liability "is common around the world." *Id.* at 1019. He rejected as misguided the *Kiobel* majority's reliance on the absence of corporate criminal liability in certain international criminal tribunals as a basis

for excluding corporations from civil tort liability under the ATS. *Id.* at 1017-18.

The Ninth Circuit also held, rejecting *Kiobel*, that corporations may be sued under the ATS in *Sarei v. Rio Tinto*, PLC, 2011 WL 5041927 (9th Cir. Oct. 25, 2011) (*en banc*) (Schroeder, J.). The *Sarei* majority looked to international law and found that there was corporate liability for the genocide and war crimes claims at issue in that case. *Id.* at *19-20.[35]

D. Corporate Civil Liability Is a General Principle of International Law.

Even if this Court were to find that an ATS plaintiff must demonstrate that corporate liability is recognized in international law, the requirement is met here. Corporate liability is not an idiosyncratic American principle. Including corporations within the universe of permissible ATS defendants is fully consistent with the way in which all legal systems treat corporations for civil liability purposes.

General principles of law common to all legal systems are a source of international law for use in ATS litigation.[36] *Flores v. S. Peru Copper Corp.*, 414

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[35] The Ninth Circuit dismissed the other claims in *Sarei* on other grounds. *Sarei*, 2011 WL 5041927, at *27-29.

[36] *Exxon*, 654 F.3d at 54 ("Unlike the manner in which customary international law is recognized through common practice or usage out of a sense of legal obligation, a general principle becomes international law by its widespread

F.3d 233, 250-51 (2d Cir. 2003) (citing the Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat 1055, 1060). Such principles are routinely established by using a comparative law approach. *See, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 286-88 (1933) (considering if a general principle of double criminality exists in absence of such a provision in a treaty).[37]

This is essentially the methodology employed by this Court in cases such as *United States v. Smith*, 18 U.S. (5 Wheat.)153, 163-80 (1820), *cited in Sosa*,

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application domestically by civilized nations."); *See also* Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 24 (2006). General principles constitute international law unless contradicted by custom or treaty. *See id.* at 393. There is no such contradiction relating to corporate liability. *See generally* Brief for Center for Constitutional Rights, International Human Rights Organizations and International Law Experts in Support of Petitioners (No. 10-1491)(filed July 13, 2011) ("General Principles *Amicus*").

[37] The *Kiobel* decision, (Pet. App. A-62-64 n. 43), fails to distinguish between customary international law and general principles of law. There is no requirement of *opinio juris* to establish the existence of a general principle of law. It is the existence of universal legal principles themselves that allows for the application of general principles in international and domestic litigation. *Exxon*, 654 F.3d at 54 n.44 (*citing* 1 BLACKSTONE, *supra*, 44 n.8); *Cheng, supra*, at 390-92; *Souffront v. La Compagnie Des Sucreries de Porto Rico*, 217 U.S. 475, 483-84 (1910) (applying principles of reciprocity as a general principle of law). Moreover, the *Kiobel* majority limited its discussion of general principles to *criminal* liability when the pertinent inquiry in an ATS case is *civil* liability.

542 U.S. at 732. The fact that all modern legal systems impose civil liability on corporations for torts committed by their agents assures that United States courts are applying universally accepted principles and not idiosyncratic American tort principles.[38]

As a universal feature of the world's legal systems, corporate civil liability for serious harms qualifies as a general principle of law.[39] There is no modern legal system which does not impose some form of tort, administrative, or criminal liability on corporations for the types of harms alleged in this case. *See generally General Principles Amicus*; *see also* Brief for International Law Scholars Supporting of Petitioners (No. 10-1491) (filed July 13, 2011) ("*Int'l Law Scholars*"), at 15-16; *see also,* Beth Stephens, *The*

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[38] The *Kiobel* majority erroneously categorized general principles as a "secondary" source. Pet. App. A-62-64 n.43. General principles are equivalent in stature to treaties and customary international law in Article 38 of the Statute of the International Court of Justice. *See* Restatement (Third) of United States Foreign Relations Law, §102(1)(c)(1987)("[A] rule of international law is one that has been accepted as such by the international community of states . . . by derivation from general principles common to the major legal systems of the world.").

[39] International Commission of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes* (2008), *available at* http://www.business-humanrights.org/Updates/Archive/ICJPanelonComplicity; *See also* Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. J. Hum. Rts., 304, 322 (2008).

Amorality of Profit: Transnational Corporations and Human Rights, 20 Berkeley J. Int'l Law 45, 67 (2002).

Legal systems throughout the world recognize that corporate legal responsibility for the torts of corporate agents and employees accompanies the statutory privilege of corporate personhood. *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) ("FNCB"). In *FNCB* this Court employed general principles of law relating to corporate veil piercing to hold a corporation liable for a tort in violation of international law. *Id.* at 623, 633.[40] The tort in *FNCB* was the expropriation of private property. This Court relied on customary international law to establish the primary violation, but relied on general principles of law to support corporate liability for that violation. This Court did not search for an exact, universal

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[40] To determine the content of international law, *First National City Bank* relied on *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 38-39 (Feb. 5)) ("Barcelona Traction"). *See* 462 U.S. at 628 n.20. There, the International Court of Justice ("ICJ") applied general principles of law as international law in considering whether a corporation was to be regarded as distinct from its shareholders. The ICJ could not answer the question solely by reference to customary international law, because "there are no corresponding institutions of international law to which the Court could resort," and needed to look to municipal law instead. *Barcelona Traction*, at 33-34, 37. The ICJ noted that international law recognized corporate institutions are "created by States," within their domestic jurisdiction, and that the Court needed to look to municipal law to answer questions about corporate separateness. *Id.* at 33, 37.

symmetry across civilized nations regarding veil piercing as the *Kiobel* majority did here. Instead, it recognized that all legal systems shared similar principles and it applied those principles to the international law issue in that case. *Id.* at 628-30.

Indeed, if the Court looks to international law at all, resort to general principles would be particularly appropriate precisely because, as noted above, international law leaves the creation of remedies for international law violations to domestic law. That is, after all, how an international tribunal would resolve this issue. *Barcelona Traction*, at 38. (ICJ turns to general principles of law concerning corporate veil piercing where international law has not established its own rules).

First National City Bank's holding that under international law an incorporated entity "is not to be regarded as legally separate from its owners in all circumstances" and that veil-piercing is a principle of international law, 462 U.S. at 623, 628-29, n.20, necessarily presumes that corporations can be sued in their own right under international law. Corporate personhood is a tradeoff, in which the owners' liability is limited, but in exchange, the corporation — a statutory legal fiction — becomes amenable to suit to compensate parties injured by the corporation's actions. Corporate liability under the ATS is appropriate because international law applies general principles of corporate responsibility to determine the liability of corporate entities created by state law.

E. The Exclusion of Corporations from the Charters of Modern International Criminal Tribunals Is Irrelevant.

The *Kiobel* majority placed great weight on the exclusion of juridical entities from the enabling statutes of modern international criminal tribunals from Nuremberg to the International Criminal Court. Pet. App. A 27-29, 41-52, 71-75. Its reliance on the absence of jurisdiction over corporations in modern international criminal tribunals reflects a fundamental misunderstanding of these statutes and the process by which they were created.[41]

While there is universal consensus that corporations are civilly liable for the torts of their agents, States treat the imposition of corporate criminal liability differently, and there is no international consensus that corporations can be criminally prosecuted.[42] At the same time, there is also nothing in the jurisprudence of international

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[41] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3. Ambassador David Scheffer, the lead U.S. negotiator at the Rome Conference, has identified the errors made by the *Kiobel* majority in an *amicus* submission in support of the Petition for Writ of Certiorari. *See generally* Brief of Ambassador David J. Scheffer Supporting Petitioners (No. 10-1491)(filed July 12, 2011).

[42] Judge Leval, (Pet. App. A 117-41, 146-62), and Judge Posner, *Flomo*, 643 F.3d at 1017-20, identify all of the reasons why the issue of corporate criminal liability is treated differently in different legal systems. These differences have nothing to do with corporate civil liability. *See* § II.E, *infra*.

criminal tribunals or international law more generally that prevents States from imposing such criminal liability. Indeed, many States have passed domestic statutes imposing corporate criminal liability in implementing their international obligations under the Rome Statute.[43] Thus, the decision not to extend criminal liability to juridical defendants in the Rome Statute cannot even be construed as a decision to provide corporations with immunity from criminal responsibility, much less civil liability, for violations of international law. Instead it is best understood as a recognition that different States have different approaches to corporate criminality.[44]

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[43] *See* Kathryn Haigh, *Extending the International Criminal Court's Jurisdiction to Corporations: Overcoming Complementarity Concerns*, 14 Austl. J. Hum. Rts., No. 1, 199, 204 n.7 (2008) (noting that Belgium, Italy and Switzerland have imposed criminal liability on corporations in legislation implementing the Rome Statute); *see* David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 Berkeley J. Int'l L. 334, 369-72 (2011) (examining corporate criminal and civil liability under European Union and European national law, including for human rights violations).

[44] Scheffer & Kaeb, at 359-61, 368-69 ("The fact that negotiations ultimately rejected corporate liability under the Rome Statute had nothing to do with rules of customary international law and everything to do with whether national legal systems already held corporations criminally liable or would be likely to under the principle of complementarity. [footnote omitted]. The issue of civil liability for corporations was not on the table . . . .").

The *I.G. Farben* case illustrates the illogic of the *Kiobel* majority's reasoning. Twenty-four executives of I.G. Farben were brought to trial for their complicity in offenses they committed as employees of the corporation, including the use of slave labor. 8 Trials of War Criminals Before the Nuremberg Military Tribunals, 1173-74 (1952). Although the London Charter provided for criminal penalties only against natural persons, the Tribunal made it clear that I.G. Farben's use of forced labor in its plants constituted a violation of international law.[45] *See* Pet. App. A 118-19 (Leval, J., concurring); *see also Flomo*, 643 F.3d at 1017; *Exxon*, 654 F. 3d at 52-53; *Sarei*, 2011 WL 5041927, at * 20.

The London Charter did not provide for civil penalties, but in the I.G. Farben case the Allied

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[45] *The Farben Case*, 8 Trials of War Criminals 1140 ("[W]e find that the proof establishes beyond a reasonable doubt that offenses against property as defined by Control Council Law No. 10 were committed by [I.G.] Farben . . . . The action of [I.G.] Farben and its representatives . . . cannot be differentiated from acts of plunder or pillage committed by officers, soldiers or public officials of the German Reich."); *see also United States v Krauch*, 8 Trials of War Criminals, at 1132 ("Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provisions of the Hague Regulations, is in violation of international law."). Some of the world's most prominent Nuremberg scholars submitted an *amicus* brief outlining the errors made by the *Kiobel* majority in its discussion of Nuremberg precedents. Brief of Nuremberg Scholars Omer Bartov, Michael Bazyler et al Supporting Petitioners (No.10-1491) (filed July 13, 2011).

Control Council had dismantled I.G. Farben and seized all of its assets by the time its executives went on trial.[46] The dismantling of I.G. Farben was part of a detailed set of laws enacted by the Control Council for, *inter alia*, the decartelization of Nazi Germany in order to provide reparations and restitution for violations of international law. In addition to I.G. Farben, Control Council laws, directives and other legal instruments targeted arms manufacturers, the coal, iron and steel industries, insurance companies and banks.[47] The Nuremberg precedents refute rather than support the idea that corporations cannot violate international law. *Exxon*, 654 F.3d at 52-53 (observing that the *Kiobel* majority ignores Control Council Law No. 9 which directed the dissolution of I.G. Farben and the disposal of its assets); *Flomo*, 643 F.3d at 1017 (holding that the *Kiobel* majority's "factual premise . . . is incorrect" regarding the absence of corporate liability for international law violations at Nuremberg).

Under the *Kiobel* majority's view, the individual executives of I.G. Farben could be sued

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[46] Control Council Law No. 2. Providing for the Termination and Liquidation of the Nazi Organizations (Oct. 10, 1945); Control Council Law No. 9. Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Council Thereof (Nov. 30, 1945).

[47] The actual conduct of States is the most important evidence of international law. *See Exxon*, 654 F.3d at 52 n.42 (finding that these actions were evidence that corporations could violate international law).

under the ATS for their actions taken on behalf of the corporation, but the corporation itself would be immune from suit, and could maintain the profits generated by the actions of its executives. Nothing in the jurisprudence from Nuremberg to today justifies such a result.[48]

F. Whether Corporations Are "Subjects" of International Law Is Irrelevant to the Issue of Corporate Liability Under the ATS.

The *Kiobel* majority based its international law analysis by taking expert opinions provided by Professors James Crawford and Christopher Greenwood in another case out of context. Pet. App. A 67-69.[49] These scholars opined that no national or international judicial tribunal had held a corporation liable for a violation of customary international law as

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[48] An 18th century equivalent would allow a corporate front for pirates or privateers engaged in breaches of neutrality to avoid liability under the ATS, while suits could be filed against the individual pirates or privateers if they and their assets could be found. Such a rule makes as little sense in 2012 as it would when the ATS was enacted. *See Flomo*, 643 F. 3d at 1017 (stating that without corporate liability, "a pirate can be sued under the Alien Tort Statute but not a pirate corporation").

[49] These expert opinions were not cited by Shell, introduced or responded to in this case because Shell never made this argument.

such.[50] *Id.* They conclude, therefore, that corporations are not the "subjects" of international law in the sense that international law had not been applied directly to corporate entities at least in the public international law context they were discussing.

This view, of course, conflicts with *First National City Bank* and *Barcelona Traction*, as there could be no international norm of piercing the corporate veil if corporations were not "subjects" of international law. Moreover, it conflicts with this Court's recognition in *Sosa* that there are areas of customary international law (*see* § II.A.3, *supra*) enforceable under the ATS distinct from the "state to state" norms of public international law to which Professors Crawford and Greenwood referred.

But, even if corporations are not considered "subjects" of international law, nothing in international law prevents Congress from imposing civil tort liability on corporations to enforce the law of

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[50] The absence of cases is, of course, not evidence of the absence of corporate responsibility under international law. *Flomo*, 643 F.3d at 1017-18 (Nuremberg would not have been possible if that were a preclusive legal principle); *see also The Lotus Case (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 10, at 28 (Sept. 7) ("Even if the rarity of judicial decisions to be found among the reported cases were sufficient to prove the circumstances argued by the French government, it would merely show that States had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so.").

nations under its domestic law.[51] Other countries use domestic civil, administrative, or criminal penalties against the same conduct, as they have discretion to do under international law.[52] Thus, the academic debate about whether corporations are "subjects" of international law is irrelevant to the interpretation of the ATS and does not override Congress's authority to provide federal common law remedies against juridical persons to redress violations of international law.

Indeed, corporations are no different from natural persons in this respect. Blackstone acknowledged that individuals were not "subjects" of international law in the sense that they do not participate in the international lawmaking process, but were still subject to liability under domestic law for offenses against the law of nations. 4 BLACKSTONE, *supra*, *68. The *Kiobel* majority claimed that the recognition of such liability was "the defining legal achievement of the Nuremberg trials," (Pet. App. A

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[51] *See Flomo*, 643 F. 3d at 1017 ("And suppose no corporation *had* ever been punished for violating customary international law. There is always a first time for litigation to enforce a norm; there has to be. There were no multinational prosecutions for aggression and crimes against humanity before the Nuremberg Tribunal was created.").

[52] *See generally* Anita Ramasastry & Robert C. Thompson, Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave breaches of International Law: A Survey of Sixteen Countries, FAFO, 2006, *available at* http://www.fafo.no/pub/536/536.pdf; *see generally General Principles Amicus.*

30), but individual liability under domestic law for international offenses had been recognized for centuries — what made Nuremberg different was prosecution at the international level, not any change in the obligations of individuals under international law. Regardless of whether they are "subjects" of international law, States have long subjected private actors to liability for international offenses; whether corporations are "subjects" of international law is of no import in this context. Nothing in international law prevents Congress from imposing tort liability on any person or entity responsible for a violation of the law of nations.

In fact, when States wish to limit corporate liability based on international law they know how to do so. In the context of international aviation, international law has regulated the civil tort liability of airlines (all of which are corporate entities) since adoption of the 1929 Warsaw Convention.[53] The Warsaw Convention and subsequent modifications of that treaty are all based on a recognition that domestic legal systems throughout the world impose tort liability on corporations (including airlines) for torts committed by their agents, and on a belief that internationally agreed upon rules were needed to limit

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[53] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000 (Warsaw Convention); Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal, May 28, 1999, S. Treaty Doc. No. 106-45, at 27 (2000), 2242 U.N.T.S. 350 (Montreal Convention).

corporate liability, *not* to create corporate liability.[54] Absent these internationally agreed upon limitations, States would be free to impose any tort remedies they chose for violations of international aviation law.

Customary international law recognizes no corporate immunity for violations of human rights law; indeed, international bodies have ruled precisely to the contrary. *See Int'l Law Scholars*, at 12-16. Under general principles of law, corporate civil liability is established in all legal systems. Customary and conventional international law establish that there is no special law-free zone for corporations.

Simply put, international law has rarely, if ever, prohibited States from taking such actions as they deem appropriate against any category of natural or juridical persons in enforcing their international obligations.

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[54] *See also* Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Art. 2, S, Dec. 17, 1997, Treaty Doc. No. 105-43 ("Each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a public official."); *see generally, Int'l Law Scholars*, at 9-16.

G. The Policy Arguments Against Corporate Liability Under the ATS Are Unavailing and, In Any Event, Should Be Addressed to Congress.

Chief Judge Jacobs, in his concurrence explaining his vote to deny rehearing, asserted that allowing ATS suits against corporations is bad policy. Pet. App. D 6-9. He claimed that corporations should not be subjected to ATS suits because "American discovery in such cases uncovers corporate strategy and planning, diverts resources and executive time, provokes bad public relations or boycotts, threatens exposure of dubious trade practices, and risks trade secrets." *Id.* at D 9.[55]

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[55] Chief Judge Jacobs asserted that "[e]xamples of corporations in the atrocity business are few in history" (Pet. App. D 8), and stated his belief that the ruling would have the "considerable benefit of avoiding abuse of the courts to extort settlements." *Id.* at D 9. Chief Judge Jacobs provides no basis, empirical or otherwise, for his beliefs about either the level of corporate complicity in human rights violations or his claim that human rights lawyers bring ATS suits to extort settlements. In fact, there have been only a handful of settlements in corporate ATS cases in the last two decades. Defendants have prevailed in two trials. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2011); *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Plaintiffs have prevailed in one trial. Judgment, *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, No. Civ-08., 1659 (BMC), (E.D.N.Y. Aug. 4, 2009) ($1.5 million torture verdict against defendant holding company); *see also Licea v. Curacao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (judgment against a corporation involved in labor trafficking). Many cases have been dismissed and a relatively small number of cases are pending. Federal courts have been faithful to this

But the merits of that claim, as well as whether such asserted costs outweigh the legal, political and moral costs of immunizing corporations from tort liability for international law violations, such as genocide and crimes against humanity, in ATS cases is, of course, up to Congress, not the courts, to decide.

The ATS was written in broad terms reaffirming our new Nation's commitment to the law of nations in the context of established principles of tort liability. Whether to exclude corporations from tort liability for law of nations violations is a legislative decision. *See* §§ II.A-C, *supra*. Congress has never acted to restrict the scope of the ATS despite every opportunity to do so.[56] If ATS suits against corporations are deemed by the political branches not to be in our national interest, Congress and the Executive can act to remedy this perceived problem. In any event, there is no evidence that a problem exists.

Judge Posner responded to a similar argument:

Court's admonitions in *Sosa*, while providing a federal forum for claims based on the handful of actionable international law norms.

[56] In 2005, Senator Diane Feinstein briefly introduced S.B. 1874 which would have sharply limited corporate and other liability under the ATS. *See* S.B. 1874, 109th Cong. (2005). Even this proposal was based on the assumption that corporations were proper ATS defendants. Senator Feinstein withdrew her proposal shortly thereafter. No other legislative proposal has been made or hearings held despite the active litigation in this area for at least two decades.

> One of the *amicus curiae* briefs argues, seemingly not tongue in cheek, that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business. That may seem both irrelevant and obvious; it is irrelevant, but not obvious. Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned.

Flomo, 643 F. 3d at 1021. Businesses involved in genocide, crimes against humanity, or other serious human rights violations deserve no exemption from tort liability.

Moreover, the courts have an arsenal of tools to limit ATS cases deemed not to meet the exacting standards in *Sosa*. Doctrines of case-specific deference have been employed to dismiss ATS cases.[57] Other cases may not overcome the pleading requirements in *Iqbal*.[58] Other claims may run afoul of *Sosa*'s

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[57] *See, e.g., Gonzalez-Vera v. Kissinger*, 449 F.3d 1260 (D.C. Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007) (political question doctrine); *Sequiha v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (international comity and *forum non conveniens*); *Fagan v. Deutsche Bundesbank*, 438 F. Supp. 2d 376, 384 (S.D.N.Y. 2006) (*forum non conveniens*).

[58] *See, e.g., Mamani v. Berzain*, 654 F.3d 1148, 1156-57 (11th Cir. 2011); *see also*, Jordan D. Sheppard, Note, *When Sosa*

requirements regarding the specificity of the evidence supporting a particular norm.[59]

As in other areas of the law, there are many disagreements about the scope and application of the ATS in particular cases. None of these difficulties warrant the judicial repeal of the ATS in all cases involving corporations or other non-natural entities like the PLO.

ATS cases against corporations constitute an insignificant portion of the dockets of federal courts. The obstacles facing ATS plaintiffs suing corporations are daunting. Under this Court's reasoning in *Sosa*, only cases alleging very serious international law violations based on strong evidence of corporate complicity will survive. The plaintiffs in this case suffered very serious human rights violations, including torture, extrajudicial killing, and crimes against humanity, at the hands of the Abacha military dictatorship, aided and abetted by respondents. The First Congress in enacting the ATS provided a federal forum for such claims.

ATS cases against corporations for their complicity in serious human rights violations fulfill

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Meets Iqbal: Plausibility Pleading In Human Rights Litigation, 95 Minn. L. Rev. 2318 (2011).

[59] *See, e.g., Flomo*, 634 F.3d at 1021-1024 (rejecting child slave labor claim) and *Sarei*,, 2011 WL 5041927, at * 6, 27-28 (rejecting crimes against humanity claim based on food and medical blockade).

this country's original commitment to enforce the law of nations by providing a civil tort remedy for "alien" victims of violations of international law. If Congress believes it is better to shield the I.G. Farbens of today's world from tort liability for complicity in international law violations such as genocide or crimes against humanity for the policy reasons expressed in Chief Judge Jacob's opinion below, it may do so. This Court should not.

CONCLUSION

For all these reasons, this Court should reverse the judgment below.

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